IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE KURIAN JOSEPH
&
THE HONOURABLE MR. JUSTICE K.T.SANKARAN

FRIDAY, THE 9TH FEBRUARY 2007 / 20TH MAGHA 1928

FAO.No. 65 of 2006()

AGAINST THE ORDER DATED 30/11/2005 IN IA .NO. 530 OF 2004 IN OS.NO.79/2005 OF THE COURT OF THE SUBORDINATE JUDGE, THIRUVALLA

APPELLANT/PETITIONER/DEFENDANT:

JOHN SIMON,
KANJIRATHUMOOTIL HOUSE, PUNNAKUNNAM MURI,
KUTTAPPUZHA VILLAGE, THIRUVALLA TALUK.

BY ADV. SRI.P.HARIDAS

RESPONDENT: COUNTER PETITIONER/PLAINTIFF:

T.H. MOHAMMED KUNJU,
THEKKEKARA HOUSE, PUNNAKUNNAM MURI,
KUTTAPUZHA VILLAGE, THIRUVALLA TALUK.

THIS FIRST APPEAL FROM ORDERS HAVING BEEN FINALLY HEARD ON 09/02/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

KURIAN JOSEPH & K.T. SANKARAN, JJ.

F.A.O. NO. 65 OF 2006

Dated this the 9th day of February,2007

JUDGMENT

Sankaran, J.

The appellant was set exparte in the suit filed by the respondent for realisation of money and an exparte decree was passed on 10.6.2004. On 8.7.2004, the appellant filed an application to set aside the exparte decree. But the application was filed under Order IX Rule 9 of the Code of Civil Procedure instead of Order IX Rule 13. The court below dismissed the application mainly on two grounds: (1) Though the application is filed within the period of limitation, the appellant has not explained the reason why he did not file the application before 8.7.2004. (2) The application is filed quoting a wrong provision of law.

2. Article 123 of the Limitation Act provides a period of limitation of thirty days to make an application to set aside a decree passed exparte. The time begins to run from the date of decree or where summons or notice was not duly served, when the

applicant had knowledge of the decree. In the case on hand, time begins to run from 9.6.2004, the date of decree. The application was filed within the period of limitation provided under Article 123 of the Limitation Act. Rule 13 of Order IX of the Code of Civil Procedure provides that in any case in which a decree is passed exparte against a defendant, he may apply to the court by which the decree was passed for an order to set it aside. The applicant has to satisfy the Court that he was prevented by sufficient cause from appearing when the suit was called on for hearing. If an application is filed within time, there is no question of any condonation of delay under Section 5 of the Limitation Act. The applicant need explain the delay only if the application is not filed within the prescribed period of limitation. He is not bound under law to explain the delay in making the application, if the application is filed within time. Of course, the Court can also consider as to why the application was not filed promptly, depending upon the facts and circumstances of each case, to arrive at a conclusion as to whether the case put forward by the applicant

that he was prevented by sufficient cause from appearing before Court is true or not. Only for that purpose, the Court could take into account the fact that the application was filed not immediately after the exparte decree was passed but on the last date or immediately before the expiry of the period of limitation. An application under Order IX Rule 13 cannot be dismissed on the ground that the applicant had not explained the delay from the date on which he recovered from his illness to the date of filing of the application, if the application under Order IX Rule 13 was filed within the period of limitation prescribed under Article 123 of the Limitation Act. The view taken by the court below that the appellant was bound to explain the delay is, therefore, erroneous, illegal and unsustainable. In **G.P.Srivastava** v. **R.K.Raizada and others** ((2000) 3 SCC 54), the Supreme Court has held that the words "was prevented by sufficient cause from appearing" must be liberally construed to enable the court to do complete justice between the parties. It was held: "In a case where the defendant approaches the court immediately and within the statutory time

specified, the discretion is normally exercised in his favour, provided the absence was not malafide or intentional."

3. It is well settled that quoting a wrong provision of law is not a ground for rejecting the prayer in an application. (See **Asher** v. **Raru** (1979 KLT 260); **Thankamma** v. **Vaikom Town Juma Masjid Mahal Sangham** (1987 (2) KLT 780); **Shaji Varghese** v. **Cherian** (1993 (1) KLT 133); **New Model Bank Ltd. (in liquidation)** v. **P.A.Thomas** (1959 KLT 1237) and **Kunhikayyumma and another** v. **Union of India and others** (AIR 1984 Kerala 184)). The appellant has filed the application under rule 9 of Order IX of the Code of Civil Procedure. The appellant was the defendant in the suit. Evidently, Rule 9 of Order IX does not apply. Only Rule 13 of Order IX applies. Simply because a wrong provision of law was quoted, the court below was not justified in dismissing the application on that ground.

4. For the aforesaid reasons, the order passed by the court below is liable to be set aside. It has come out in evidence that an exparte decree was passed against the appellant on an earlier occasion and it was set aside on his application. Though strictly speaking it may not be relevant in considering the application under Order IX Rule 13 on the merits, certainly it could be a relevant factor in awarding costs. Taking into account the facts and circumstances of the case, we are of the view that the appellant should be directed to pay costs of Rs.1,000/- to the respondent within a period of one month from today as a condition for setting aside the exparte decree. If the appellant fails to pay the costs, the order impugned will remain in force and the F.A.O will stand dismissed with costs.

The Appeal is allowed as above.

(KURIAN JOSEPH)
Judge

(K.T.SANKARAN)
Judge

ahz/

KURIAN JOSEPH&
K.T.SANKARAN, JJ.

F.A.O.NO. 65 OF 2006

JUDGMENT

9th February, 2007